No. 88-10 (6)



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## BRIEF OF RESPONDENT DANIEL CONNAUGHTON

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## QUESTIONS PRESENTED FOR REVIEW

(1) Does the record contain such overwhelming evidence of actual malice as to mandate an affirmance of the judgment by any standard of review?

(2) Is the Sixth Circuit's judgment of affirmance based upon the type of independent *de novo* review required by *New York Times* and *Bose*?

(3) Should the Court abandon the requirement of independent appellate review of public figure libel judgments or at least limit that review to the ultimate issue of fact — whether the record as a whole supports the jury's or trial court's finding that the plaintiff proved actual malice by clear and convincing evidence?

(4) Does the requirement of independent appellate review established in *Bose* violate the Seventh Amendment?

(5) If not, would construing *Bose* to mandate *de novo* review of each separate underlying factual issue, as Petitioner urges, violate the Seventh Amendment?

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 842 F.2d 825 and is included in the Appendix to the Petition for a Writ of Certiorari.

## CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment, United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## STATEMENT OF THE CASE

### Counterstatement of Facts

On November 1, 1983, the *Journal News*, a division of Harte-Hanks Communications, Inc., published a front-page article quoting a woman named Alice Thompson as stating that Daniel Connaughton, a candidate for Municipal Judge, promised her sister and her jobs and trips and other benefits "in appreciation" for their grand jury testimony that corrupt practices, including bribery, were occurring in the Hamilton Municipal Court, and that Connaughton told her that he intended to play a tape of their statements for incumbent Judge Dolan, his opponent, to force Dolan to resign. The article began by quoting Thompson as charging Connaughton with "dirty tricks" in promising her anonymity and not delivering it.

The statements attributed to Thompson, other statements appearing in the article, and the headline, were false and defamatory in that they were damaging to Connaughton's

professional reputation. The article may have caused him to be defeated for judge in the November 8, 1983 election.

The employees of the *Journal News* who designed the article and decided to publish it knew that the article was harmful to Connaughton. They also knew that it was false, because all of the persons asked by the *Journal News* whether Connaughton made the statements in question to Thompson told the *Journal News* that Connaughton made no such statements. They also knew that Thompson had been convicted of a crime of deception, had a history of psychiatric illness, and had an admitted motive to fabricate the statements she made to the *Journal News* about Connaughton.

The *Journal News* consciously avoided pursuing clearly available means of making absolutely certain that Thompson's statements were false. Yet, by the time of the prepublication conference when they made the final decision to publish the article, the *Journal News'* decisionmakers had formed the belief that Thompson's damaging accusations against Connaughton were based on Thompson's misinterpretations of what she had heard.

However, notwithstanding entertaining very serious doubts as to the truth of Thompson's statements, the *Journal News* nonetheless published them, because it was smarting from the *Cincinnati Enquirer's* front page exposé of corruption in the Hamilton Municipal Court and was anxious to reestablish the *Journal News* as the dominant news force in Hamilton politics, and also because it wished to revive the sagging campaign of incumbent Judge Dolan, who had been badly wounded by the *Cincinnati Enquirer* and had come to the *Journal News* seeking aid and comfort. The *Journal News'* method of accomplishing those dual objectives was that of using Thompson's statements to turn the focus of Hamilton public opinion from the authentic issue of corruption in Judge Dolan's court to the spurious issue of whether Connaughton had employed unethical means to obtain grand jury testimony against Judge Dolan and his Director of Court Services, Billy Joe New.



**Procedural History**

The case was tried to a jury before Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, in a bifurcated proceeding. The liability trial resulted in three separate verdicts for the plaintiff, culminating in the verdict that the *Journal News* published a defamatory, false article about the plaintiff with actual malice.[1]

Thereafter, the issue of damages was tried to the same jury, which awarded the plaintiff $5,000.00 in compensatory damages and $195,000.00 in punitive damages.

Prior to trial, Harte-Hanks moved for Summary Judgment, advancing *inter alia*, two legal defenses — that the *Journal News* was immune from liability because Thompson's statements were opinions rather than facts, and that the doctrine of neutral reportage gave the newspaper a privilege to publish the article in question. The District Court rejected both defenses in denying the motion.

Subsequent to the judgment, the defendant moved for judgment *n.o.v.* In denying that motion the District Court stated, "the Court is of the opinion that a properly impaneled jury, correctly instructed, awarded a verdict against the defendant that is appropriate from the evidence adduced." (J. App. at 8, Doc. No. 74).

The Sixth Circuit panel which heard the appeal devoted more than a year to conducting the painstaking, *de novo* review of the record mandated by this Court in *Bose Corp.* v.

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[1] Number one, "Do you unanimously find by a preponderance of the evidence that the publication in question was defamatory toward the plaintiff?" "Yes."

Number two, "Do you unanimously find by a preponderance of evidence that the publication in question was false?" "Yes."

Number three, "Do you unanimously find by a clear and convincing proof that the publication in question was published with actual malice?" "Yes."

*Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), "to ensure that the judgment does not pose a forbidden intrusion into First Amendment rights of free expression." *Connaughton* v. *Harte-Hanks Communications, Inc.*, 842 F.2d 825, 828 (6th Cir. 1988). A panel majority consisting of Judges Krupansky and Keith affirmed the judgment in an opinion by Judge Krupansky. Judge Guy dissented.

A Petition For Rehearing And Suggestion For Rehearing *En Banc* was duly denied.

The case is before this Court pursuant to a grant of *certiorari*.

## SUMMARY OF ARGUMENT

Respondent hopes that *certiorari* was granted because this case so well illustrates the practical infeasibility of the independent appellate review component of the rule stated in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and expanded in *Bose*, that the Court has chosen this case as the vehicle either to abandon that rule for the reasons expressed by Chief Justice Rehnquist in his dissent in *Bose* or at the very least to limit it to the ultimate fact as did the original panel in *Tavoulareas* v. *Piro*, 759 F.2d 90 (D.C. Cir. 1985), *rev'd en banc*, 817 F.2d 762 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 200 (1987).

As is demonstrated herein, however, affirmance of the Sixth Circuit's judgment upholding Daniel Connaughton's verdict does not depend upon any change in the law, but only upon the recognition that the Sixth Circuit's analytical approach is as faithful to this Court's *Bose* teaching as it is possible to be, and that the record amply demonstrates that Respondent's verdict rests upon clear and convincing evidence of actual malice.



The judgment must be affirmed because (a) the jury's actual malice determination is predicated upon evidence of actual malice that is even greater than clear and convincing, and (b) the Court of Appeals' judgment of affirmance was entirely faithful to the process of independent *de novo* review of the actual malice determination required by *New York Times* and *Bose*, insofar as it is possible to understand and carry out that process.

Moreover, the Court should discard the independent appellate review component of the *New York Times* rule and overrule *Bose*, inasmuch as such review is constitutionally troublesome and practically infeasible.

The record overflows with evidence of actual malice. A survey of the law demonstrates that the verdict rests comfortably upon principles of law established by this Court in its seminal libel opinions.

It is respectfully submitted that the Court should take guidance from the opinion of the original panel of the D.C. Circuit in *Tavoulareas*, as did the Sixth Circuit, recognizing that if appellate review is not limited to the ultimate constitutional fact — whether there was actual malice — the process will eviscerate the role of the jury and vest appellate courts with original jurisdiction in libel actions.

Even if the Sixth Circuit had reviewed each separate factual issue, Harte-Hanks would only be buried deeper in fault. Moreover, contrary to Petitioner's contention, all of the Court of Appeals' subsidiary findings on which the jury could have found actual malice are abundantly supported by cogent evidence.

Finally, the Seventh Amendment appears to stand as an insurmountable obstacle to the independent appellate review process mandated in *Bose*. This case is a ideal vehicle for overruling *Bose* and treating public figure libel cases like all other cases.

## ARGUMENT

### (A) Introduction

The Supreme Court's decision to review this judgment at a time when the case law is replete with misgivings concerning *New York Times* and its progeny presents Respondent with a unique opportunity to rekindle the debate about public figure libel law.

Justice Black stated unequivocally that, ". . . to review the factual questions in cases decided by juries . . . is a flat violation of the Seventh Amendment." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 171 (1967), Black, J., dissenting. Justice White has, "increasing doubts about the soundness of the Court's approach," in the *New York Times* case, even though he joined in the judgment and opinions in that case and in later decisions extending the *New York Times* standard. He has since become, "convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." *Dun and Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985), White, J., concurring. Justice White recognizes that under the *New York Times* rule the, "plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation." *Id.* at 768. He went on to observe:

> The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

*Id.* at 769.



One who has secured a favorable verdict for a public figure, has persuaded an appellate court that that verdict is supported by clear and convincing evidence, and is arguing the same evidentiary considerations once again in the United States Supreme Court as though this Court were a court of original jurisdiction or another jury, appreciates the characterization of the process of independent appellate review which appears in Chief Justice Rehnquist's dissent in *Bose*, wherein he stated that the:

> facts dispositive of [a *de novo* review of the "constitutional facts" surrounding the "actual malice" determination] — actual knowledge or subjective reckless disregard for truth — involve no more than findings about the *mens rea* of an author, findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context.

*Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 515 (1984), Rehnquist, J., dissenting.

This case perfectly illustrates the practical infeasibility of an appellate *de novo* fact review of the "actual malice" determination, where, as here, a record is so permeated with evidence of a newspaper's recklessness that no appellate court could vitiate the jury's verdict except by reversing every one of the jury's many "*mens rea*" determinations and credibility assessments, obvious and subtle, without having heard or observed any of the witnesses. "Courts, including this one, are not annointed with any extraordinary prescience." *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 79 (1971), Marshall, J., dissenting. No experienced trial lawyer will take issue with the view expressed by Justice Harlan, dissenting in *Time Inc.* v. *Pape*, 401 U.S. 279, 294 (1971), that he could not discern in the First Amendment,

> . . . [A]ny additional interest that is not served by the actual-malice rule of *New York Times* but is substantially promoted by utilizing this court as the ultimate arbitor of factual disputes in those libel cases where no

> unusual factors, such as allegations of harassment or the existence of a jury verdict resting on erroneous instructions, . . . are present.

*Id.*

If this Court is considering discarding or limiting the *de novo* appellate review component of the *New York Times* rule and overruling *Bose*, we urge it to do so in this case.

We would not want the Court to misperceive our position, however. The verdict and appellate judgment under review, founded as they are upon as powerful a record of clear and convincing evidence of actual malice as any plaintiff could wish to adduce, will pass muster under the strictest standard of proof and review. If, as Justice Scalia stated in *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563, 1570-1571 (D.C. Cir. 1984), *vacated and remanded*, 477 U.S. 242 (1986), "the 'clear and convincing evidence' constitutional standard in public figure libel cases is similar to application of the 'beyond a reasonable doubt' constitutional standard in criminal cases," the verdict in this case was properly secured. Moreover, even if Petitioner were correct that the verdict must pass appellate scrutiny of each separate underlying and subsidiary factual issue, a contention which is demonstrably incorrect, such exhaustive scrutiny would only reinforce the conclusions the Sixth Circuit has reached.

To a survey of the record we now turn.

### (B) The Record Is Overflowing With Evidence Supporting The Jury's Verdicts On Every Issue

An examination of the record will convince even the most defense-biased student of libel litigation that this was a case which the defendant had little chance to win, even with the law stacked against public figures, for the evidence weighed heavily in the plaintiff's favor. Indeed, Connaughton's evidence on every count, including the newspaper's intention to injure him, was overwhelming and, to a large extent, uncontroverted. Concluding the liability case, the newspaper's general counsel, James Irwin, admitted that at the final prepublication conference, he was told by the editorial director, the managing editor and the publisher that Alice Thompson's defamatory statements about Dan Connaughton, which the paper was preparing to publish, were all the result of Thompson's misinterpretations of what she heard.[2] Thus, the defendant's knowledge that the libelous statements were probably false was conceded by the defendant's lawyer.



That Irwin, armed with that knowledge, advised the newspaper that there was no legal reason not to publish the article, is beyond comprehension. Interestingly, the jury requested that Irwin's testimony be read to them (Record at 928), and we may thus conclude that the jury gave it the considerable weight it deserved in reaching several verdicts.

Irwin's remarkable concession is enough, without more, to support the jury's verdict on both falsity and actual malice. Where, as here, a newspaper published statements about a lawyer which it knew had the potential to harm him professionally, while knowing that such statements represented a misunderstanding of fact on the part of their author, the newspaper published falsehoods when it "in fact entertained serious doubts as to the truth of the publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). The jury's several verdicts in favor of the plaintiff were based upon far more than the testimony of James Irwin, however, and we now endeavor to summarize the clear and convincing evidence that supports each of those verdicts.

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[2] "*I was told* as we went over this line by line *that* Dan Connaughton did deny making any offers and that *she misinterpreted his comments and discussions about the jobs and trips.*" (J. App. at 196).

Petitioner goes out of its way to refer to that as a strained interpretation of Irwin's testimony, but the transcript demonstrates otherwise. Irwin, an experienced lawyer, was asked at trial whether he made that precise statement during his deposition and he acknowledged that he did. *Id.*

### (C) The Plaintiff Proved By Clear And Convincing Evidence That The Article Was Defamatory

"A statement is defamatory where taken as a whole it causes injury to a person's reputation . . . or affects such person adversely in a trade or profession." Charge to Jury (Record at 911).

The record is glutted with testimony that the article had the potential to harm the plaintiff and that the *Journal News* knew that before it decided to publish it. Joe Cocozzo, the publisher, admitted that it was because he recognized the potentiality of harm in the article, indeed its potentially libelous nature, that he felt the paper had an extra duty to doublecheck and be as accurate as it could possibly be. That was the reason he scheduled a prepublication meeting "to go over it one more time," not something the newspaper customarily did. (J. App. at 95, 96). The article's author, reporter Pam Long, acknowledged that in questioning the plaintiff at the *Journal News* offices the day before the article was published, she said to Connaughton (of the Thompson accusations the paper was preparing to publish), "that seems to be a hefty charge against you." (J. App. at 277). James Irwin admitted that the things the newspaper said about Connaughton, if said about him (Irwin) would have the potential to harm him professionally; that such statements could harm a lawyer's professional reputation. (J. App. 193).

Dan Connaughton had the following impression of the way in which the article portrayed him:

> I believe that the article portrayed me as a person that is engaged in, at the very least, unethical conduct if not illegal conduct and certainly portrayed me to be a person that would be unfit for public office and I think contained therein is the intimation that I was a person that was suborning perjury and trying to alter the grand jury testimony in some way.
>
> . . .



> Finally, by intimation, there is a part of the article that suggests that I had attempted to blackmail the incumbent judge by presenting him tapes in order to get him to resign. (J. App. at 128).

Prosecutor John Holcomb conceded that if a person were to play a tape for a public official for the purpose of forcing him to resign, that would be extortion. (J. App. at 153). Former Common Pleas Judge Arthur Fieher said the article had a detrimental effect upon Connaughton's reputation and that, based upon his political experience, he was of the opinion that an article of that kind could affect the outcome of an election. (J. App. at 101). Attorney David Green testified that, based on personal observations and conversations with other members of the community, it was his opinion that the article was extremely detrimental to Connaughton's campaign for Municipal Judge and also to his law practice. (J. App. at 102). "In this business . . . the only thing that you really have to sell is your reputation. That is, your reputation to exercise mature, intelligent judgment, and when you get into a situation where you have claims such as he tried to bribe Grand Jury witnesses, it can't do anything but have a detrimental effect on your business." (Record at 333).

### (D) The Plaintiff Proved By Clear And Convincing Evidence That The Article Was False

> A publication is false when it's not substantially true. The truth or falsity of a publication is based upon its nature and obvious meaning, taking into consideration the publication as a whole. A publication should be considered substantially true if the actual truth would produce the same impression on the reader as the statement which was made. Charge to Jury (Record at 911).

In order to merit a jury verdict in his favor on the issue of falsity, the plaintiff was required to demonstrate that the

statements which the *Journal News* attributed to Alice Thompson—that Dan Connaughton promised jobs and trips to her sister and her, promised her anonymity and said that he was going to play the tapes of the Stephens/Thompson interview to Judge Dolan to force him to resign—were not substantially true. Finally, in order to earn an affirmative verdict at the liability phase of the trial, the plaintiff also had to prove that the *Journal News* entertained serious doubts as to whether those charges were true at the time it published them. Appreciating that there is a kinship between the proof of falsity and the proof of actual malice, the Court will also appreciate why some of the evidence on these two issues is inevitably overlapping.

The most persuasive evidence that the article was false is the admission of James Irwin that at the prepublication meeting the editorial decison-makers told him that Thompson simply misinterpreted what Connaughton said to her. (J. App. at 196). The spontaneous yet consistent testimony of the many persons who participated in or audited the Connaughton/Berry interview of Stephens and Thompson on September 17, 1983 at the Connaughton home further reinforces the absolute falsity of the quoted statements.

The jury heard the following question put to Dan Connaughton:

> . . . everybody in the courtroom knows that you've heard the statement made that you made promises of jobs and trips to these ladies that night and either you or your wife supposedly made some promises of jobs or trips or celebration or something later on. I guess I need to ask you whether during that entire meeting you made any reference to any jobs or trips or promises or offered anything or said anything that could even be reasonably interpreted, misinterpreted as an offer or promise of anything. Did you?



And they heard his answer:

> Never at any time. (J. App. at 119-120).

Connaughton was also asked:

> Did you at any time say to either of these ladies, "I'm going to use these tapes, take the tapes and play them for Dolan or New or both of them, and try to force them to resign?"

Connaughton answered:

> No, sir. (J. App. at 123).

In response to the question, "Did you promise their names would never come out in public?" Connaughton answered:

> No, sir. They expressed that concern. I can't say who it was specifically. I said, "Only thing I can tell you is I really don't know where this is going to go, but insofar as I might have control over these things, we would try to keep their names from being prominently displayed in the public," so far as I could . . . (J. App. at 121).

Patsy Stephens, Alice Thompson's sister, who was in Alice's company on every occasion when either Dan or Martha Connaughton spoke with Thompson, was interrogated exhaustively as to whether either Dan or Martha Connaughton promised or offered either her sister or her anything, and Stephens answered unequivocally and repeatedly that they did not. The final question put to Stephens was:

> Now, I'll ask you again, if at any time during that entire discussion that either Mr. or Mrs. Connaughton promised or offered you or your sister anything?

And Stephens' answer was:

> No, sir. (J. App. at 63).

The defendants brought Stephens back to the stand for the purpose of discrediting Connaughton. The attempt backfired entirely, however, and Stephens reiterated that the testimony she gave earlier in the trial was the truth. (J. App. at 71, 75).

Systematically, the plaintiff showed the jury that the people who attended the September 17, 1983 meeting stated that no promises or offers were made to Thompson or Stephens. Dan Connaughton's wife Martha testified that neither she nor her husband nor Mr. Cox nor Mr. Berry discussed in any manner any jobs, trips or other offers or promises of any material goods to these girls in exchange for what they were disclosing. (J. App. at 113). Nor did Mrs. Connaughton discuss such things with Thompson and Stephens on any occasion. (J. App. at 114).

And both Ernest Barnes, the Deputy Fire Chief of the City of Hamilton, and his wife, Jeannette, a former employee of the *Journal News*, neighbors of the Connaughtons, who were asked to attend the September 17, 1983 interview as observers, testified unequivocally that Dan made no offers or promises to Thompson or Stephens at any time during that meeting. The *Journal News* regarded both Ernest and Jeanette as credible.[3] The record also reflects emphatic denials of Thompson's allegations by Dave Berry who also was present at the September 17 meeting. (Record at 235; J. App. at 105-106, 110). It is worth noting that Jeanette Barnes called Larry Fullerton, assistant managing editor of the *Journal News*, and invited him to attend the meeting, but he declined. Joint Exhibit 1 shows that Fullerton contributed to the story. (J. App. at 329).

[3] Tom Grant, the *Journal News* police reporter sent along with Pam Long by Managing Editor Walker to interview Mr. and Mrs. Barnes because he was personally acquainted with them, testified that in his capacity as a police reporter he had known Ernie Barnes for several years and regarded him as a generally credible person; likewise, he was acquainted with Jeanette Barnes because she worked at the *Journal News* and he considered her a credible person. (J. App. at 90). If the *Journal News* regarded the Barneses as credible, how can it blame the jury for believing them? Would not the Barnes' statments that Connaughton made no promises or offers to Thompson be enough to cause the *Journal News* to regard the Thompson statements as improbable? This inquiry becomes particularly significant as evidence of knowledge of probable falsity, i.e., actual malice.



Thus, by actual count, six of the eight people who were present during the September 17, 1983 taped interview of Stephens and Thompson—Patsy Stephens, Dan Connaughton, Martha Connaughton, Dave Berry, Jeanette Barnes and Ernie Barnes—told the jury that the charges Thompson leveled against Connaughton were utterly unfounded. This testimony constitutes clear and convincing evidence of falsity, particularly when considered in connection with the *Journal News*' admitted prepublication belief that Thompson simply misinterpreted what Connaughton said to her. This evidence is augmented by other uncontroverted evidence of falsity. That other evidence is of two types, the first of which casts a dark cloud over Thompson's credibility; the balance of which demolishes it. The former evidence came from Thompson herself and was known by the *Journal News* at the time it made the decision to publish her accusation against Connaughton.

When Thompson was interviewed by Blount and Long she told them she was unemployed. In fact she was working at Rinks two and a half days a week. (J. App. at 169-170). At trial Thompson testified that Dan Connaughton's voice was on the tapes of the September 17, 1986 meeting. (J. App. at 170). When Blount and Long interviewed her, however, she told them several times that if they listened to the tapes they wouldn't hear Dan's voice because he turned the tapes off before he talked. (J. App. at p. 295, Def.'s Exh. J). Thompson also told the jury that not all of Dan's questions were leading and that sometimes there was an open discussion. (J. App. at 170). But she acknowledged that she had told Long and Blount when they interviewed her on October 27, 1983, that Dan led her and all she could say was yes or no. "Yes, I did say that." (J. App. at 171). Thompson also admitted that she had been a patient in Hughes Psychiatric Hospital and had also been hospitalized at Mercy Hospital for taking an

overdose of drugs and for a suicide attempt. (J. App. at 176). She also admitted that after her name was listed as a grand jury witness in the newspaper she was worried that people would think she was a "snitch" and went around telling everything she knew on people. She told her sister Patsy that in order to counteract that impression she was going to tell the newspaper that she made the disclosures about Billy New and Judge Dolan because Connaughton induced her to do so with offers and promises of jobs and trips. (J. App. at 177). She wanted the *Journal News* to run a story about why she made the statements to Connaughton. She asked attorney Matt Crehan, who had represented her in an assault charge, to arrange the meeting. (J. App. at 178).

The jury had previously heard Blount admit that when Hank Masana asked the *Journal News* to listen to Alice Thompson, Blount knew that Masana represented Billy Joe New (J. App. at 27) and that he was a supporter of Judge Dolan. (Record at 69-70). Blount also admitted that Thompson told Long and him that she had twice been convicted of crimes in the Municipal Court, once of shoplifting (a crime of deception) and once of assault. (J. App. at 35). Is it any wonder that the jury chose to believe that Thompson's statements about offers and promises from Connaughton were not true, particularly when Thompson's credibility was pitted against that of her sister Patsy, the Connaughtons, Dave Berry and the Barneses?

If the foregoing is not sufficient evidence that the article was false, consideration should be given to the numerous material inconsistencies between the transcript of the October 27, 1983 Blount/Long interview of Thompson (J. App. at 278, Def.'s Exh. J) and the tape of the September 17, 1983 interview of Thompson and Stephens at the Connaughton house (Pl.'s Exh. 34), which the jury heard in its entirety twice, first during the plaintiff's case in chief and again during its liability deliberations. (A transcript of its contents is Plaintiff's Exhibit 33). That tape dispositively disproves the charges Thompson leveled against Connaughton and goes a long way toward proving the plaintiff's case on actual malice as well.



For example, contrary to what Thompson told Blount and Long, Thompson did not ask what she was going to get out of it; Connaughton's voice was *on* the tape a substantial part of the time; Connaughton did not ask many leading questions but induced a full discussion; he did not promise the ladies anonymity; Connaughton did not say that he intended to play the tapes for Dolan and New to force them to resign; and at no time did Connaughton make any reference to any offers or promises of anything to anybody. Indeed, the only conclusion that can reasonably be reached from listening to the tapes of that September 17, 1983 meeting is that the account which Alice Thompson gave Blount and Long of the discussion which she held on that occasion with Dan Connaughton is incorrect in every material respect. That conclusion, coupled with Thompson's known unreliability and motivation to fabricate a story about her interview with Connaughton, and the testimony of the many credible witnesses that Connaughton made no promises or offers to Thompson and Stephens, made the task of finding for the plaintiff on the issue of falsity an extremely easy one for the jury. As stated previously, most of the evidence that the article was false is also evidence that the *Journal News* knew that it was false and thus published those falsehoods with actual malice. Thus, the transition from a discussion of the evidence of falsity to that of actual malice is natural and logical.

### (E) The Plaintiff's Proof That The *Journal News* Published The Article With Actual Malice Is Not Merely Clear and Convincing; It Is Almost Uncontroverted

A publication is made with actual malice when made with the knowledge that it is false or with reckless disregard of whether it is false or not. A reckless statement is one made with serious doubt as to the truth of the statement before its publication. Actual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer. Rather, the focus of the inquiry is on the defendant's at-

> titude towards the truth or falsity of the publication. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of its publication.

Charge to Jury (Record at 911-912.)

The exhaustive documentation of the plaintiff's proof of actual malice would overwhelm both the writer and the reader. The record is replete with evidence, both direct and circumstantial, that those who made the final decision to publish the November 1, 1983 article which harmed Dan Connaughton well knew that Alice Thompson's charges against Connaughton were either deliberate fabrications or the emanations of a disordered mind which had badly misinterpreted innocuous amenities. But the *Journal News* was on a predetermined course to damage candidate Connaughton. Its single-minded preoccupation with its political objective left no room for further investigation of the facts, fair evaluation of the information that it had gathered, or the self-restraint to avoid publishing libelous statements whose truth it seriously doubted.

### (1) Direct Evidence of Actual Malice

The admission of James Irwin that at the prepublication conference, the publisher, manager, editor and editorial director told him that Thompson's charges against Connaughton were based on misinterpretations (J. App. at 196) is consistent with that of Pam Long, author of the libelous article, who admitted that when she wrote the article she was unable to make an assessment of the truth or falsity of Thompson's claims. (J. App. at 59). Long went on to say that at the time she wrote the article she believed that Thompson believed what she said.[4] Seeking to drive home the difference

[4] Of course, Long's admitted inability to determine whether Thompson's statements were true could have been overcome if she had used either of the two available means to verify them, listen to the tapes or interview Patsy Stephens. She wrote the article without doing either.



between Long's believing that Thompson believed what she was saying and Long's believing that Thompson's statements were actually true, plaintiff's counsel asked this question:

> Saying you believed she said it, she believed it, is not the same thing as saying you believe that Dan Connaughton said it, is it?

The Court then terminated the interrogation on this issue, saying, "Mr. Lloyd, I think you made your point. Would you pass onto something else." (J. App. at 60). Presumably, the point was also made to the jury's satisfaction. Long simply did not know whether or not Thompson's accusations against Connaughton were true when she wrote the story. That is direct evidence of actual malice.

Moreover, James Blount conceded that he admitted when he was deposed that "there is no judgment on our part as to who was telling the truth." (Record at 638). That is also an admission that the newspaper entertained serious doubts as to the truth of the Thompson statements.

It is noteworthy that the deposition statements of Irwin, Long and Blount, which were acknowledged at trial, were all made before the District Court ruled that the neutral reportage defense was unavailable.[5] It is a strong inference that those admissions were made in unguarded candor when the *Journal News'* lawyer, editorial director and reporter all held the erroneous belief that a newspaper has a right to publish what one person says about another so long as it also quotes the target of the attack in the same article. Viewed in that light, those admissions should be given extraordinary weight.

[5] Order Denying Motion For Summary Judgment. (J. App. at 4, Doc. 24).

### (2) Circumstantial Evidence of Actual Malice

#### (a) Evidence Of The Journal News' Bad Faith Motive To Harm Connaughton

The Court properly instructed the jury that in determining whether the newspaper published the article with actual malice, one of the elements they might consider was evidence of personal spite, ill-will or intent to injure on the part of the writer. Consistent with that principle of libel law, in order to show the jury that what the *Journal News* did was something it had a motive to do, the plaintiff demonstrated that the *Journal News'* November 1, 1983 front page article quoting Thompson's charges against Connaughton was the culmination of an evolving plan to damage Connaughton as a candidate for Municipal Judge a week before the election. It is clear from the events preceding the first of November, 1983 that the *Journal News*, and in particular James Blount, the editorial director, wished to do serious damage to the Connaughton campaign for two reasons: to help incumbent Judge James Dolan retain his position as Municipal Judge, and to reestablish the *Journal News* as the principal molder of political opinion in Hamilton. The two objectives were closely tied together.

Earlier in the campaign Blount had a visit from Judge Dolan, about whom rumors of corruption were rife. Dolan told Blount that the *Cincinnati Enquirer* had been investigating claims that Billy Joe New, Dolan's principal attaché, had been accepting bribes for fixing cases. The inquiry was beginning to focus on Dolan directly. Dolan asked Blount for advice. (J. App. at 18). Blount and Dolan were acquainted. The *Journal News* endorsed Dolan when he first ran for the Court. (J. App. at 19). At the time of Dolan's visit to Blount, New had resigned. It was common knowledge that the prosecutor had convened a grand jury to investigate charges against New and Dolan, principally because of the



taped statements Stephens and Thompson had given to Connaughton. Dolan was under intense pressure.

The next relevant event occurred on the morning of October 27, 1983, when the *Cincinnati Enquirer* published an exposé of the Dolan Court. (J. App. at 212, Pl.'s Exh. 2). Whatever the repercussions of that were for Judge Dolan, they were great for the *Journal News*. The local newspaper's position as the dominant political voice in Hamilton (J. App. at 22) had been preempted by the *Cincinnati Enquirer*. The *Enquirer* had wounded Hamilton Municipal Judge Dolan. The only recourse left for the *Journal News* to reestablish its political dominance was to control the outcome of the election by inflicting a mortal political wound to the challenger, Connaughton.

Blount went to work to get that done. Events were playing into his hands. Earlier, Hank Masana, Billy New's lawyer and a known supporter of Judge Dolan (Record at 69-70), had arranged with Blount and the *Journal News* publisher, Joe Cocozzo, for the *Journal News* to interview Alice Thompson. (J. App. at 26). She was trying desperately to find a way to create the public impression that she wasn't an ordinary "snitch" but had turned state's evidence against New only because Connaughton promised her sister and her jobs and trips. (Only she knows why she thought it would improve her reputation to have people think she had made these statements in exchange for a consideration.) Thompson had tried without success to tell her story to the *Cincinnati Enquirer*. (J. App. at 27).

On October 27, 1983, Blount and reporter Pam Long went to Masana's office and interviewed Thompson. (Record at 72). The interview was tape-recorded and a transcript was made of it. (J. App. at 278, Def.'s Exh. J). Blount and Long learned that Thompson hoped that the *Journal News* would publish her claim that she talked to Connaughton only because he promised benefits to her sister and her. (J. App. at 36). They learned that she had a history of psychiatric illness

and a criminal record. (J. App. at 35). They heard her say that when she and Patsy were interviewed at the Connaughton home she asked what the interview was all about and then Dan turned off the tape (J. App. at 172) and promised them jobs and trips. They heard her say that Connaughton turned the tapes on and off so that he could make the inducements without recording them, that if they listened to the tapes of that interview they would not hear Dan's voice (J. App. at 29, 30), that Dan promised her anonymity, that Dan said he was going to play the tapes for Dolan to force him to resign and make no further use of them. (J. App. at 180). She also told Blount and Long that her sister Patsy would back up her statements about the promises and offers. (J. App. at 32).

Blount and Long thus had statements from a young woman with a history of psychiatric illness, a criminal record, and a wish to publish her reasons for "snitching" on Billy New, accusing a lawyer of good repute of inducing testimony with promises and offers of jobs and trips. And this woman had come to the *Journal News* under the auspices of a lawyer who had reason to encourage her to make statements helpful to his client, Billy New, and his ally, incumbent Judge Dolan.

Red lights were flashing all around Thompson. And there were a number of ways to verify whether Thompson was telling the truth. The best way would have been to listen to the tapes of the September 17, 1983 interview to determine whether what Thompson said about the discussion was true. Another excellent way would have been to ask *all* of the other persons who attended that interview whether what Thompson said was true, particularly Patsy Stephens, who Thompson told the *Journal News* would back up her statements and who was alleged to have been the other recipient of the promises and offers.

Bob Walker, the *Journal News*' editor in chief, called a number of reporters to a meeting in his office on Friday, October 27th. A predetermined list of questions was given to



each reporter based on Long's notes of the interview with Thompson. Each person known to have been in attendance at the interview Connaughton held with Stephens and Thompson — save Patsy Stephens — was targeted, and reporters were assigned the task of interviewing one or more of these persons. All of the interviews were supposed to be held separately and simultaneously on the following Monday, October 31, so that the persons interviewed would have no opportunity to square their stories. (Record at 208-212).

Before that was to occur, however, Jim Blount prepared the *Journal News*' readers for what he was planning to do to Dan Connaughton. He made an attack on the *Enquirer* in his Editor's Notebook column in the Sunday, October 30th, *Journal News*. (J. App. at 207, Pl.'s Exh. 1). In that column not only did Blount criticize the *Enquirer* for giving the Dolan story front page coverage, he questioned the *Enquirer's* credibility.[6] Linking the *Enquirer* to Connaughton, Blount also stated that, "Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-maker." (J. App. at 207, Pl.'s Exh. 1). Blount admitted that it is somewhat unusual to criticize another newspaper. (J. App. at 20). The *Enquirer* and the *Journal News* were the two papers having the largest circulations in the Hamilton community. (J. App. at 21). In the area served by the Hamilton Municipal Court, the *Journal News* had a larger circulation than the *Enquirer*. Blount would like to think that the *Journal News* had a greater capacity to influence public opinion in Hamilton than the *Enquirer* did. "We like to get a story ahead of them, but it's like the Bengals and the Steelers. Sometimes the Steelers are going to win and sometimes the Bengals are going to win." (J. App. at 22).

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[6] "Stories on the Dolan-Connaughton fight in the *Enquirer* last week certainly helped fuel the fire. But in the process the motives and the credibility of the Cincinnati newspaper is in question. . . . Judge Dolan suggested an answer when he charged Jim Delaney with threatening a page one smear Thursday morning . . ." (J. App. at 207, Pl.'s Exh. 1).

In his October 30, 1983 column, Blount signaled several attitudes that are relevant to the issues in this case: (i) that the *Journal News* was smarting from the *Enquirer's* scooping the *Journal News* about the judicial election in Hamilton; (ii) that the *Journal News* resented the *Enquirer's* treatment of Judge Dolan; (iii) that the *Journal News* also resented the fact that the *Enquirer's* exposé of Dolan had boosted Connaughton's campaign; and (iv) that the *Journal News* was evincing a tendency to behave recklessly in publishing a rumor about Connaughton for which it had no evidentiary support (J. App. at 23).

Having telegraphed its unsubtle game plan, the *Journal News* proceeded to execute it. On Monday, October 31, 1983, most of the planned interviews were conducted. Not one of the people who was interviewed corroborated Thompson's story. (Record at 223). And two of those who said there was no truth to what Thompson said were persons whose credibility the *Journal News* acknowledged to be beyond challenge — Deputy Fire Chief Ernest Barnes and his wife, Jeannette. The *Journal News* also interviewed Dan Connaughton, who not only unqualifiedly denied making any offers or promises to Thompson or Stephens but tried to help the *Journal News* understand why Thompson might have misinterpreted what she heard.[7] During that interview, Blount and Long asked Connaughton repeatedly whether he would give them tapes of the September 17, 1983 interview, conveying the impression that they were most anxious to listen to the tapes. (J. App. at 259, Def.'s Exh. I). The tapes were freely turned over to them. But Blount and Long admitted that they never listened to them. (J. App. at 33). After all, with their decision to publish the story already made, the

[7] "She was getting an enormous amount of pressure from street people who were calling her all kinds of names and she was very disturbed and upset by the fact that I was the cause of this and while, as I asserted before, I never promised anonymity or any such thing, I told the *Journal News* that I could understand how she could feel." (J. App. at 127.)



last thing they needed was to be confronted by even more evidence that Alice Thompson's statements were patent fabrications.

The other evidence that the *Journal News* did not want to confront was what Patsy Stephens would have to say. The *Journal News'* disdainful disinterest in Patsy's testimony is evidence of reckless disregard for the truth.

### (b) In Re Patsy Stephens

The fact is that the *Journal News* made no attempt to reach Patsy Stephens prior to the time the article was published. Pam Long's explanation for not trying to reach Stephens is that Connaughton said that he would put Stephens in touch with the newspaper. Connaughton was asked, "Did you at any time on the thirty-first of October, 1983, tell Ms. Long, Mr. Blount or anybody else at the *Journal News* that you would try to get Patty Stephens to come in and talk to them?" His answer was, "Not at all. That subject matter never arose at any time." (J. App. at 142).

Publisher Joseph Cocozzo, who made the ultimate decision to publish the article (J. App. at 92), was aware that at the time he made the decision, Stephens had not been interviewed. But he was not aware that no attempts had been made to contact her. He "was made aware that we had thought we were going to talk to her the day before. . . . In fact, there was some hope that we could have talked to her that Tuesday morning prior to publication. . . . In all honesty, I would say that the time I approved, gave my permission to run it, I had interpreted that as meaning that we had a firm appointment to talk to her." (J. App. at 94).

Managing Editor Bob Walker was aware that whatever was said to Alice was supposedly likewise said to Patsy, and it occurred to him it would have been good practice to contact Patsy Stephens. (J. App. at 84). But he said, "We would like to have talked to Patsy Stephens, we had no way to reach her." He said nobody tried to reach her on Friday, Saturday,

Sunday or Monday. (J. App. at 84). Walker said that to his knowledge Pam Long did not try to interview Stephens at all before the article was written. (J. App. at 85). But when Walker was deposed prior to trial he said he believed Pam Long attempted to interview her prior to publication. Walker later corrected his deposition and said he was mistaken when he made that statement. (Record at 214-215). In any event, at the time of the prepublication conference Walker still thought it was important to contact Stephens. (J. App. at 86). But like Cocozzo, he failed to take any steps to hold up publication of the article until after the *Journal News* could interview her.

General Counsel James Irwin said that he understood that there had been no contact with Patsy Stephens prior to publication. It did not occur to him that responsible journalism indicated that she should be contacted before the article was published to see whether she confirmed Alice Thompson's statements. (Record at 808-809).

Jim Blount's confusion about the *Journal News'* failure to contact Stephens is as strange as his explanation of why he didn't listen to the tapes he was so very interested in obtaining. During the *Journal News'* interview with Thompson Blount asked her, "What's your sister's position in this? Would she support you or would she support him?" Thompson assured him Stephens would affirm her statements. (J. App. at 255, Def.'s Exh. I). Blount agreed that "at that time" it would have been interesting to hear her comments. (J. App. at 32). Indeed, Blount knew that it was Stephens, not Thompson, who was the main player so far as supplying information about Billy New on the operation of Judge Dolan's Court was concerned. (J. App. at 32-33).

When he was deposed on May 31, 1984, Blount testified that he was at Pam Long's desk on the afternoon of October 31, 1983 (the day before the article was published) and he knew that Pam Long was talking to Stephens "and they mutually agreed that they both could not talk at that time." Blount had a reason to remember that this phone conversation occurred on October 31st. "That was Halloween and



Pam Long had made a commitment to her daughter to go trick or treating. I think Pat or Patsy, whatever her name was, decided that she would rather wait until the next morning." (Record at 109-110).

Pam Long testified that neither she nor any other representative of the *Journal News* even tried to reach Stephens before the article was published. (J. App. at 56). She also admitted that when Walker, the managing editor, assigned reporters to interview people who were present during the September 17, 1983 session at the Connaughton home, the one person who was present at that meeting who was not on the list to be interviewed was Patsy Stephens. (*Id.*) Long attempted to explain that by saying that when she and Blount interviewed Connaughton on October 31st, he "volunteered to help Patty get in touch with us and so based on that representation we assumed that Patsy would get in touch with us." (J. App. at 57).

That explanation is not credible, not only because Connaughton denied that during his discussion with Long the subject of putting Stephens in touch with Long ever came up, but also because Long cannot explain the *Journal News'* failure on October 28th to assign someone to interview Stephens on the ground that on October 31st Connaughton volunteered to put Stephens in touch with Long.

Considering all of the foregoing, the jury could not help but regard the failure of Blount and Long to interview Stephens, who would have told them that Thompson's statements were utterly untrue, as evidence that Blount and Long did not wish to hear Stephens discredit Thompson. If the jury inferred that Blount and Long purposely avoided interviewing Stephens in order to circumvent yet another obstacle to publishing Thompson's statements, such an inference was rationally based. Further, if the jury also inferred that Blount dissembled with Walker and Cocozzo about attempts to interview Stephens, that inference was also rationally based.

### (c) Other Suspect Behavior Evidencing Actual Malice

Alice Thompson told Blount and Long that she had informed the Hamilton Police that Connaughton made promises and offers to her. (J. App. at 278, Def.'s Exh. J). An excellent way to check her credibility would have been to ask the police whether that statement was true. Cocozzo asked Blount whether the police had been contacted about this. Cocozzo said he was told by Blount that the *Journal News* had checked with the police and the police said they did not have time to check those claims out. Cocozzo was given the impression that either Blount or Tom Grant, the police reporter, asked the police that question. (J. App. at 95). Bob Walker also said that Blount told him he asked Tom Grant to contact the police to determine whether Thompson told them the same tale about Connaughton that she told the *Journal News*. (J. App. at 86-87).

Jim Blount told two diametrically opposite stories about this, as he did about Pam Long's attempt to reach Patsy Stephens. When his deposition was taken, Blount said that he asked Tom Grant to ask that question [whether Miss Thompson told them the same thing she told Blount about inducements from Mr. Connaughton] starting with the chief and then to get the chief's permission to follow it as far as he could. He then stated that "Mr. Grant's report back to me was they did not pursue that line of questioning. They were only interested in Billy New in court." (J. App. at 38).

But Tom Grant made it clear that Blount gave him no such assignment. Grant's first involvement with the November 1, 1983 article about Connaughton was the day before the interview was published, when he and Long went to the Barnes' home to interview Ernie and Jeanette. Earlier that same day Blount asked him to check with the Hamilton Police to see if the investigation on Billy New was continuing.

Blount did not even tell Grant that a woman named Alice Thompson had come to the *Journal News* with charges



against Connaughton and the paper wanted to verify them; he did not ask Grant to go to the police and ask them whether Thompson told them what she told the newspaper; nor did Blount even tell him to ask the Police about Thompson's general credibility. (J. App. at 88).

When he testified at trial, Blount told a story that varied from his deposition testimony but was still substantially at odds with what Grant said. Blount continued to say that he asked Grant to ask the police whether Thompson told them what she told him about Connaughton and that Grant couldn't verify from them that she made such a statement. Blount then said he spoke with some policemen about the matter. (J. App. at 37-38).

Apparently, Blount misrepresented to Walker and Cocozzo that he tried to check out the Thompson story with the Hamilton Police when he really hadn't and then tried to cover his tracks as best he could. By this time, the jury's assessment of Blount's credibility was no doubt at point zero. Blount probably dissembled with Walker and Cocozzo about attempts to check out the Thompson statements with the police as he did about attempts to reach Patsy Stephens. The circumstantial evidence that Blount was not going to let anything prevent the publication of the Connaughton story is compelling indeed.

One further evidentiary discrepancy doubtless added to the jury's conclusion that the *Journal News* went out of its way to do a hatchet job on Dan Connaughton. At no place in the transcript of the Blount/Long interview of Alice Thompson does Thompson make any reference to "dirty tricks" or say that Connaughton's offers and promises were "in appreciation for" her testimony. Yet the phrase, "dirty tricks," is featured in the *Journal News*' front page story. When asked about that, Long said that Thompson used the phrase, "dirty tricks," at the beginning of the conference prior to the taping. "When *we* were preparing the article, it became very clear that *we* needed a paragraph to explain what she was — what

was coming to the *Journal News*. And it was very apparent that the word dirty tricks was there. Mr. Blount and I had both heard it and it was used to describe that." (Record at 554-555, our emphasis). That seems unlikely, however, as "dirty tricks," a political trigger phrase that became popular in the Watergate days, is more likely to have been supplied by Blount than used by Thompson. And it is significant that in describing the designing of the article, Long twice used the word, "we," suggesting that Blount participated in the construction of the story.

### (F) A Survey Of The Applicable Law Shows That Daniel Connaughton's Judgment Was Secured Under Established Legal Principles.

Harte-Hanks and its media *amici* strive mightily to persuade the Court that Dan Connaughton's victory has been achieved at a sacrifice of established law and traditional values. When one evaluates the record against the context of extant and applicable principles, however, the conclusion is inescapable that the verdict and the existing law of libel can comfortably coexist.

For example, Justice White taught us in *St. Armant* v. *Thompson*, 390 U.S. 727, 730-731 (1968), that "Professions of good faith will be unlikely to prove persuasive. . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Jim Blount and Pam Long admitted to having numerous compelling reasons to doubt Alice Thompson's veracity.

In *Herbert* v. *Lando*, 441 U.S. 153, 164 (1979), this Court affirmed that malice may be established both by direct proof of state of mind [such as the admissions of Irwin, Blount and Long] or by showing all relevant circumstances concerning the publication.



In a well-reasoned opinion, the original majority of the D.C. Circuit in *Tavoulareas* v. *Piro*, 759 F.2d 90, 114 (D.C. Cir. 1985), rev'd *en banc*, 817 F.2d 762 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 200 (1987), consisting of Senior Circuit Judge MacKinnon and then Circuit Judge Scalia, articulated the principle that, "In *any* case where the mental state of an actor is at issue, it can be proved by the *cumulation* of circumstantial evidence." That is one of the means the plaintiff employed to prove actual malice in this case. The *Tavoulareas* panel affirmed the statement from *Curtis Publishing* v. *Butts*, 388 U.S. 130, 169 (1967), that, ". . . evidence that a newspaper followed a sensationalistic policy, because it provides a *motive* for knowing or reckless falsehood, is *evidence* of actual malice." *Tavoulareas*, *supra*, at 117. Personal motives on the part of a newspaper [such as to salvage an incumbent judge and reestablish a newspaper's political influence] are evidence of recklessness or willful disregard for the truth which may be considered along with other evidence of malice.

> . . . one who is seeking to harm the subject of a story — whether motivated by simple ill will, or partisan political considerations, . . . or a mere desire to attract attention and boost circulation — is more likely to publish recklessly than one without such motive.

*Id.* at 118 (citations omitted).

And heavy reliance on a source whom the defendant knows to be biased and unreliable [Alice Thompson] in itself demonstrates reckless disregard for the truth. *Id.* at 127; *St. Armant*, *supra*, at 732. Knowledge of the harm that is likely to follow publication of a story is relevant to whether it was published with actual malice. *Curtis*, *supra*, at 170; *Tavoulareas*, *supra*, at 131. Publisher Cocozzo and lawyer Irwin both testified that they knew the article would harm Connaughton when they decided to publish it.

The *Curtis* Court also recognized that ". . . highly unreasonable conduct constituting an extreme departure from

the standards of investigation and reporting ordinarily adhered to by responsible publishers," *Curtis*, *supra*, at 158, such as publishing an uncorroborated statement from a source known to have been convicted of a crime of dishonesty [Alice Thompson], failing to interview a witness who was with the source when the reported conversation was overheard [Patsy Stephens], failure to view a game film [or listen to a tape] to determine whether the informant's information was accurate, is evidence of recklessness amounting to actual malice. *Id.*, 157-158.

It is thus clear that the jury properly based its conclusion that Connaughton's proof of malice was clear and convincing upon its consideration of a mix of the exact type of direct and circumstantial evidence which this Court has consistently equated to recklessness on the part of publishers.

**(G) The Judgment Was Appropriately Affirmed By The Sixth Circuit.**

Petitioner argues that the Court of Appeals applied an incorrect standard of review, and, mirroring Judge Guy's dissent, that certain statements which Connaughton made to the *Journal News* mandate a reversal of the judgment.

Judge Krupansky, writing for the Court, assidiously traced and applied the evolving *New York Times* rule to this case, and, moreover, gave the record as exhaustive an independent review as the most stringent reading of *Bose* could command. The Court of Appeals doubtless understood that Harte-Hanks was urging it to substitute Petitioner's view of the evidence for that of the jury in derogation of Connaughton's right to a jury trial guaranteed by the Seventh Amendment. The Sixth Circuit also understood that inasmuch as the entire record contained sufficient evidence of actual malice to support a plaintiff's verdict, Connaughton was clearly entitled to have the jury believe his version of the facts instead of the newspaper's, and therefore to prevail on appeal. The fact that Petitioner does not agree with the jury's or the Trial Court's



or the Court of Appeals' view of the evidence is beside the point, as this Court has never stated that in order for a public figure to recover against a newspaper the evidence of actual malice has to be uncontroverted. "The plaintiff need not obtain an admission of fault from the defendant." *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *vacated and remanded*, 477 U.S. 242 (1986).

There is nothing in *Bose* in which the Petitioner can take comfort and much which cuts against its position. Contrary to what Petitioner asserts, *Bose* does not deal the "clearly erroneous" standard of appellate review out of public figure libel litigation, but, rather, as the Court of Appeals recognized in this case, strikes a pragmatic balance between Rule 52(a) and the rule of independent review applied in *New York Times*, being "faithful to both." *Connaughton*, *supra*, at 829. A finding may be set aside only where, "the reviewing court *on the entire record* is left with the definite and firm conviction that a mistake has been committed," minding the command of Rule 52(a) that " 'due record' shall be given to the trial judge's [or jury's] opportunity to observe the demeanor of the witnesses." *Id.*

Petitioner would have this Court regard *Bose* as authority for the hypothesis that its blatant mischaracterization of Connaughton's speculation as to why Thompson may have misunderstood him,[8] buried under an avalanche of evidence

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[8] The *Journal News* quoted Thompson as claiming that during the taped interview on September 17, 1983, when the tape was turned off, Connaughton made promises about a job and a post-election trip to Florida for Thompson and Stephens (Joint Exhibit I, J. App. at 333). Not only did Connaughton unqualifiedly deny that he made any offers or promises, he made it clear to the *Journal News* that any comments by his wife Martha that Thompson may have misinterpreted as offers or promises were made at a later time, not at Connaughton's house, and that they had nothing to do with obtaining any information about the Municipal Court. He told Blount that the tape of his interview with Stephens and Thompson which he had given to Blount would, "speak for itself." (Defendant's Exhibit I, J. App. at 264, 5). Blount never listened to the tape. At trial Connaughton again flatly denied making any offers or promises.

of actual malice, somehow mandates a reversal of the judgment. However, the analytical method the *Bose* Court adopted trenches in the opposite direction. In *Bose* this Court went out of its way to make clear that the testimony upon which the reversal of the plaintiffs' judgment hinged would not have rebutted "any evidence of actual malice that the record otherwise supports. . . .", *Bose*, *supra*, at 512, had there been any such evidence. Understanding *Bose* correctly, the Court of Appeals did not misperceive Petitioner's disingenuous interpretation of Connaughton's answers as rebutting the overflowing evidence of actual malice which both the jury found clear and convincing. It is clear that the Sixth Circuit clearly understood the teaching of *Bose*. Judge Krupansky's observation is particularly instructive:

> The dissent, by characterizing as admissions Connaughton's answers to the *Journal* reporter's hypothetical questions during the interview of October 31st, which questions were calculated to elicit purely speculative answers and conjectures, without considering Connaughton's expressed denials to direct questions concerning Thompson's controversial testimony and her purely subjective understandings of Connaughton's statements, or any of the other evidentiary evaluations of the con-

As the Court of Appeals concluded, the jury simply believed Connaughton and found defense counsel's argument that Connaughton's speculations were admissions to be unpersuasive. For any appellate court to substitute a contrary credibility assessment of Connaughton's testimony for that of the jury's would be to run roughshod over Respondent's 7th Amendment rights and violate this Court's teaching in *Bose* that "due regard shall be given to the [jury's] opportunity to observe the demeanor of the witnesses." *Bose*, at 499-50.

Inasmuch as the gravamen of Thompson's claim was that during the September 17th interview, when the tape was turned off, Connaughton promised Stephens and her jobs and trips as inducements for their statements then being taped about Dolan and New, Connaughton's speculation that Thompson might have misunderstood something his wife said days later could not rationally be seen as an admission of the truth of Thompson's charges.



> flicting testimony, clearly demonstrates the wisdom of the Supreme Court's teachings in *Bose*, which were designed to protect a plaintiff's rights to a jury trial in a defamation case against invasion of the jury's fact-finding perogatives anchored in credibility assessments of witnesses available only to the actual trier of fact.

*Connaughton*, *supra*, at 836, n.5.

### (H) Petitioner's Contention That The Court Of Appeals Erred In Not Extending Its Independent Review Process To Each Underlying Fact Determination Is Clearly Incorrect

Contrary to Petitioner's assertion that *Bose* required that the Court of Appeals independently review each underlying factual issue present in the record, the Sixth Circuit, following the reasoning of the panel majority in *Tavoulareas*, decided that *Bose* contains no such requirement. Respondent urges this Court to take its guidance from the original panel Opinion in *Tavoulareas*, as did the Sixth Circuit.[9]

The *Tavoulareas* panel logically analyzed *Bose* as follows:

> The issue *Bose* presents in the present context is whether we are to apply our independent judgment to

[9] The panel reversed a judgment *n.o.v.* and reinstated a jury verdict for a public figure against the *Washington Post*. Upon rehearing *en banc*, the *en banc* majority reversed the panel and reinstated the judgment *n.o.v.*, *Tavoulareas* v. *Piro*, 817 F.2d 762 (D.C. Cir.) (en banc), *cert. denied*, 108 S.Ct. 200 (1987). In this case the Sixth Circuit disapproved of the *Tavoulareas en banc* majority's opinion, stating that that Court, ". . . judged the credibility of witnesses without the opportunity of visual observations, it evaluated both the credibility and weight of the evidence, and denied the plaintiff his entitlement to have the evidence along with all inferences reasonably drawn therefrom to be viewed in the light most favorable to the plaintiff. The opinion appears to have accorded no deference to the pronouncements of the Supreme Court addressing issues of defamation, falsity, and malice enunciated in *New York Times* v. *Sullivan*,

each separate fact determination that forms the basis for the ultimate conclusion of "actual malice," or rather only to the ultimate conclusion of clear and convincing proof of "actual malice." For a number of reasons, we think the latter is the case.

First, the Court's expression of its holding in *Bose* is phrased only in terms of the ultimate issue; and certiorari had been granted only "to consider whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Court's 'finding' of actual malice." *Id.* at 1955.

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Second, the court of appeals decision affirmed in *Bose* had *not* questioned the factfinder's preliminary factual determinations. The issue under review was whether it could properly be found defamatory, under an "actual malice" standard, for the defendant to print that the loudspeakers manufactured by the plaintiff caused musical instruments to sound as though they were wandering "about the room." As the Supreme Court noted, the court of appeals had accepted all the district court's factual findings, observing "that it 'was in no

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376 U.S. 254 (1964), and its progeny; *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); and other milestone decisions that have, over the years, addressed those keystone issues. In sum, the *en banc* court appears to have intruded into the original jurisdiction of a trial court jury." *Connaughton*, at 842, n. 11.

The Sixth Circuit went so far as to state that, "The rationale of the *Tavoulareas en banc* majority has placed it squarely in the paradoxical position of discarding jury trials in actions for libel thereby denying the plaintiff his Seventh Amendment right to trial by jury." *Id.*, n. 10.

Respondent urges this Court to regard the *Tavoulareas en banc* majority's opinion as an abberation.



position to consider the credibility of witnesses and must leave such questions of demeanor to the trier of fact.' " *Id.* at 1955 (quoting 692 F.2d at 195). The Supreme Court noted with approval this refusal of the court of appeals to second-guess credibility findings of the fact-finder. *Id.* at 1958. The Court likewise did not question them.

* * *

That *Bose* addresses only the ultimate question of actual malice is shown, thirdly, by its reliance upon the distinction between questions of fact (which are governed by Rule 52(a) and questions of law (which are for the court).

* * *

In sum, if the Court's statement in *Bose* that "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review," *id* at 1964 n. 27, is not limited to the *ultimate constitutional fact* (e.g., whether the writing was "obscene," whether there was a "clear and present danger," or, in the context of the present case, whether there was "actual malice"), then we see no rational stopping point short of holding that all factual issues in a First Amendment case are for the court. To embrace that kind of *de novo* review, as advocated by the dissent, would eviscerate the role of the jury and, in effect, vest appellate courts with original jurisdiction in libel actions.

*Tavoulareas, supra*, at 107-108.

### (I) Independent *De Novo Review* Of Each Separate Factual Determination Would Reinforce The Sixth Circuit's Conclusions

The Court of Appeals identified eleven subsidiary or operative facts from which the jury could have based its finding of actual malice by clear and convincing evidence.[10] If the Court of Appeals had wished to examine the record even more minutely, as Petitioner contends that it should have, to verify whether all of the separate and underlying facts support the verdict, the Sixth Circuit could have developed a massive compendium of facts which would have further reinforced its holding that the plaintiff had proved actual malice with convincing clarity. An exhaustive recitation of such underlying facts would represent a veritable encyclopedia of the record itself. The findings that follow are merely illustrative of what one could unearth from the record in this case:

—That prior to publication General Counsel Irwin was informed by the publisher, editorial director and the reporter that Alice Thompson's allegations were based entirely upon misinterpretations. (Record at 819, 822-823).

—That Editorial Director Blount's malicious state of mind was signaled in his October 30 column where he wrote "the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-makers." Three days earlier, on October 27, the *Cincinnati Enquirer* had published its front-page scoop on Judge Dolan's court. At trial Blount conceded that the *Journal News* never confirmed nor even investigated this so-called rumor. (Record at 62-64).

—That the *Journal News* selectively chose which allegations to publish in an effort to hurt Dan Connaughton's candidacy and to protect Judge Dolan. For example, the

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[10] *Connaughton* v. *Harte-Hanks Communications, Inc.*, 842 F.2d 825, 843-844 (6th Cir. 1988).



newspaper's November 1 story failed to include Thompson's contention that Judge Dolan was present when Billy Joe New took bribes. (Record at 814).

—That the *Journal News*' November 1 story did not disclose key players in the controversy because they were known Dolan-supporters: Hank Masana, Billy Joe New's attorney who arranged the *Journal News*' interview with Thompson (Record at 70, 72) and Matt Crehan, Thompson's attorney who put her in touch with Masana. *See* cross examination of Blount. (Record at 629-630).

—That Dolan-supporter Masana was more than a neutral observor at the *Journal News*' October 27 interview by Blount's own admission. Blount acknowledged that Masana verbally induced Alice Thompson to make certain statements at that interview. (Record at 99-100). However, Masana's participation was not disclosed in the November 1 article.

—That on October 25 Blount privately advised Judge Dolan how to handle the negative publicity anticipated by the October 27 *Cincinnati Enquirer* exposé on his courtroom, thereby evidencing the confidential, personal relationship that existed between the two. (Record at 53-54).

—That Blount ignored the *Journal News*' internal guidelines which discourage staff members from becoming directly involved in political campaigns (Record at 616) by privately advising Judge Dolan just two weeks before the election (Record at 53-54) and by conspiring with Dolan-supporter Masana (Billy Joe New's attorney) to arrange the October 27 interview with Thompson at the Masana law offices.

—That Blount never assigned police reporter Tom Grant to verify Thompson's allegations and credibility with police officers investigating the Billy Joe New bribery case. (Record at 228-229).

—That the *Journal News*' excuses for not reaching Patsy Stephens ring false, especially for a newspaper in the business

of finding and interviewing people in a small town. (Record at 124, 242-243). Further, eight or nine reporters were assigned to this story.

—That the *Journal News* deliberately quoted out of context every explanation Connaughton gave for Thompson's false allegations. (Record at 549, 629-632).

—That reporter Pam Long failed to include in the November 1 story Connaughton's denial that he promised Ms. Thompson anonymity. (Record at 546).

—That the devastating direct quotes which appeared in the November 1 story — "in appreciation" for and "dirty tricks" — cannot be found in the transcript of Thompson's taped interview on October 27. (Record at 570-571).

—That reporter Long's indifference to contradictory information was evident even after the November 1 story was published when Long cancelled an interview requested by Stephens. Stephens wanted to expose her sister's lies (Record at 167-168), but a time was never arranged. (Record at 777-778).

—That the variance between Stephens' and Thompson's recollections could not be attributed to just a difference in interpretation (Record at 191), despite the *Journal News'* attempt to retreat behind such a justification.

—That the November 1 story implied Connaughton had to induce Stephens and Thompson to reveal Billy Joe New's corruption when in fact Stephens was anxious to meet and reveal this information and Thompson decided to accompany her sister to the September 17 all-night meeting at the Connaughton's home. (Record at 397-399).

—That cross examination of Alice Thompson (Record at 740-756) and her mother, Zella McQueen (Record at 760-762) impeached their testimony in instances too numerous to cite.

The foregoing recitation thus demonstrates that the more deeply one digs into the massive evidence underlying the



jury's finding of actual malice, the more support one discovers for that finding. Why does Harte-Hanks seek a more comprehensive review of the record when such an exercise would only bury it deeper in culpability?

### (J) The Record Fully Supports The Court Of Appeals' Identification Of Eleven Subsidiary Facts On Which The Jury Could Have Based Its Finding Of Actual Malice.

Petitioner tries in vain to persuade the Court that the record does not support the Sixth Circuit's identification of eleven subsidiary facts from which the jury could have found actual malice. The following analysis demonstrates, however, that the Court of Appeals read the record correctly.

*Evidence Establishing Subsidiary Fact (1):*

Blount's "confidential personal relationship" with Judge Dolan was revealed (a) by Blount's private meeting with Dolan on October 25 at which he advised Dolan how to handle the negative publicity anticipated by the October 27 *Cincinnati Enquirer* exposé on Dolan's court practices. (Record at 52) and (b) by Blount's private meeting on October 19 with Hank Masana, a known Dolan-supporter and attorney for the corrupt Billy Joe New. (Record at 69). Blount and reporter Long did not interview Thompson until October 27 so as to accomodate Masana's vacation schedule. (Record at 72). Blount conceded that Masana induced Thompson to make certain statements during the October 27 interview. (Record at 99-100).

The *Journal News'* "consistently unfavorable" coverage of Connaughton and "consistently favorable" coverage of Dolan was evidenced by the rumor Blount inserted in his October 30 column (Pl's. Exh. 1) implying that the *Enquirer* published a front-page exposé on Dolan's questionable courtroom practices on October 27 because of Connaughton's alleged "wealthy, influential link to *Enquirer* decision-makers."

Blount acknowledged that this so-called rumor, or as he phrased it, "unproven suggestion" was never confirmed or even investigated. *See also* the Court of Appeals' discussion of the "absurdity of Blount's unfounded accusation." *Connaughton, supra,* at 834, n.3. Curiously, Blount's column never contended that the October 27 *Enquirer* scoop was untrue. Nevertheless, Blount took a swipe at Connaughton just nine days before the election based on Blount's "unproved suggestion."

Moreover, the *Journal News* reported that Dolan fired Billy Joe New while knowing that New had resigned. (Record at 813). This slant shed a more favorable light upon Dolan than the truth would have.

The *Journal News* decided not to publish allegations by Thompson that Dolan was present when Billy Joe New took bribes (Record at 814) while eagerly publishing Thompson's extremely damaging allegations against Connaughton. Dolan received the ultimate in favorable editorial coverage by winning the newspaper's endorsement two days before the election. (J. App. at 250, Def's. Exh. H).

*Evidence Establishing Subsidiary Facts (2), (3) and (4):*

The October 30 column by Blount (Pl's. Exh. 1) represents probative, tangible evidence of the highest quality in respect to the bitter rivalry the *Journal News* faced with the *Enquirer*. In that column Blount blasted the *Enquirer's* front-page placement of its October 27 exposé on Dolan's questionable practice of disposing of cases behind closed doors in the absence of the prosecutor.

Blount's criticism of the *Enquirer* placement of this local story ahead of world news was a deceptive strategem to undermine the *Enquirer's* market share in the Hamilton area. It is elemental journalism that sensational local news is a tremendous draw for readership and subscribers. The *Enquirer's* placement of its exposé of the Hamilton Municipal Court was perfectly proper. The *Enquirer's* exposé was more



than an embarrassment to the *Journal News*; it was recognition that the *Journal News* missed a major story in its own backyard. Blount attempted to counteract it in his Sunday October 30 column and subsequent news articles for fear that the story would diminish the *Journal News'* circulation.

By Blount's own admission, the *Enquirer* and the *Journal News* were the newspapers with the largest circulations in the Hamilton community (Record at 59) and he grudgingly acknowledged, "We like to get a story ahead of them . . ." (Record at 60).

Still more evidence of that rivalry was the *Journal News'* decision to publish Thompson's allegations on November 1, a date the Court of Appeals correctly identified as critical to the timing of the *Journal News'* campaign to further the election of its candidate Dolan by discrediting Connaughton before the forthcoming election and thereby fortifying its reputation within its circulation area as the dominant respected and influential image-maker to the detriment of the *Enquirer*. *Connaughton, supra,* at 846.

*Evidence Establishing Subsidiary Fact (5):*

The transcript of the *Journal News'* interview with Alice Thompson, (Def's. Exh. J appearing on pages 279 through 321 of the Joint Appendix), is permeated with Thompson's antagonism toward Connaughton, specifically, according to her, because she was afraid people would think that ". . . I'm a rat and I'm a snitch . . ." (J. App. 304-5). Thompson claimed that Connaughton promised Stephens and her a vacation in Florida and a job (J. App. 293-4) and also assured her that her name would not be made public (J. App. 296), and that Connaughton didn't deliver on any of these promises. Thompson's antagonism towards Connaughton leaps out from the pages of Def's. Exh. J. Moreover, Connaughton told Blount and Long of a phone call he received from Thompson hysterically accusing him of betraying her when her name appeared in the paper as a grand jury witness. (J. App. 273, Def's. Exh. 2).

*Evidence Establishing Subsidiary Fact (6):*

Petitioner challenges the Court of Appeals' sixth finding "that the *Journal News* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition."

That finding is based in large part on Jim Blount's admissions that he knew that he was evaluating the credibility of one who had twice been convicted, once for assault and once for shoplifting, and who was rumored to have had psychiatric problems. (J. App. 35). The suggestion that the *Journal News* could have presumed Thompson credible because Connaughton based his criminal complaint on the statements of Thompson and her sister Stephens is logically improbable from the evidence, inasmuch as the record discloses that the principal testimony upon which that complaint was based came from Stephens, not Thompson (J. App. 147) and that Connaughton, (on the advice of Butler County Prosecutor John Holcomb), did not file a complaint until after Stephens passed a polygraph test arranged by Connaughton. (J. App. 153, 268).

*Evidence Establishing Subsidiary Fact (7):*

The seventh subsidiary fact, "that every witness interviewed by *Journal* reporters discredited Thompson's accusations," is challenged by Petitioner on the basis that "this presumed finding" ignores Connaughton's own "confirmation" during an October 31 interview.

The argument that Connaughton "confirmed" Thompson's statements, which is the linchpin of Harte-Hanks' defense, is based upon an egregious distortion of the record. As discussed *supra* at length, Connaughton not only did not "confirm" Thompson's charges, but, to the contrary, unqualifiedly and vehemently denied them during his discussion with Blount and Long on October 31, 1983 (J. App. 262-267, Def's Exh. I) and again at trial. (J. App. 119-123).



*Evidence Establishing Subsidiary Fact (8):*

Petitioner challenges the Court of Appeals' eighth finding that "the *Journal* intentionally avoided interviewing Stephens . . ." and maintains instead that the *Journal News*' failure to interview Stephens was not intentional. That issue is discussed at length *supra* under the subheading "(b) In Re Patsy Stephens." The record begs for the inference that the *Journal News* intentionally avoided interviewing Patsy Stephens in order to circumvent an obstacle to publishing Thompson's statements.

*Evidence Establishing Subsidiary Fact (9):*

Contrary to what Petitioner seems to be contending, the jury doubless did find it to be uncontroverted that the *Journal News* knew that Thompson's allegation would discredit and damage Connaughton. *See* discussion of the proof of the defamatory nature of the article that appears *supra* under the heading "(C) The Plaintiff Proved By Clear And Convincing Evidence That The Article Was Defamatory." Both Cocozzo and Irwin admitted that they knew that the article would damage Connaughton. (J. App. at 95-96, 193).

Harte-Hanks also erred in criticizing the Sixth Circuit's finding in this regard as legally irrelevant. This Court stated in *Curtis Publishing Company* v. *Butts*, *supra*, at 170, that a publisher's knowledge of the harm that is likely to follow publication of a story is relevant to whether it was published with actual malice.

*Evidence Establishing Subsidiary Fact (10):*

The inference that the prepublication legal review was a sham may reasonably be drawn from a number of facts: (a) that Publisher Cocozzo was so convinced that the article as written had the potential to harm Connaughton that he arranged a prepublication conference with counsel and yet gave the green light to publish despite not having his misgivings

resolved; (b) that Irwin, after being advised by the others that Thompson's charges were the result of her misinterpretation of what she had heard, nonetheless advised his client that the newspaper had the legal right to publish the article; (c) that Walker and Cocozzo both believed that Stephens should have been interviewed before the article was published but failed to hold up publication until the *Journal News* could interview her; and (d) that Harte-Hanks made a particular point of trying to convince the jury that the decision to obtain the advice of the *Journal News*' very learned lawyer before publishing the article demonstrated the newspaper's good faith. Therein lies the ultimate sham. In fact the advice Irwin gave to publish the article bordered on legal malpractice. Judge Rubin advised the jury that the advice of counsel is not a defense to libel. (Record at 797). If it were, the worst advice would be the best defense for the most outrageous defamation.

*Evidence Supporting Subsidiary Fact (11):*

Finally, there is substantial evidence in the record that the *Journal News* "timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*." The Court of Appeals correctly identified the most obvious examples of the *Journal News*' invidious timing. Although Blount assembled a team of reporters on Friday, October 28, to interview each of the persons who had been present at the various meetings attended by Stephens and Thompson, Blount decided at the meeting that the assigned interviews were not to begin until the following Monday which was October 31, the *day after* he published his vituperative Sunday column, "Editors' Notebook." (J. App. 207, Plf's. Exh. 1). Blount's October 30 column was carefully contrived and designed to condition the public to the Thompson charges which were to be published two days later on November 1. The *Journal News* endorsed



Dolan two days before the election. (J. App. 250, Def's. Exh. H).

Drawing the parallel between the facts of *Curtis*, *supra*, and this case, the Court of Appeals appropriately concluded by the record:

> Publication could have been withheld until a later date to accommodate a thorough investigation of credibility implications of the magnitude presented by Thompson's accusations which were of conspicuous concern to Cocozzo, the publisher, Blount, the editorial director, and Walker, the editor of the *Journal*, unless of course the November 1st publication date was crucial to the timing of the *Journal's* campaign to further the election of its candidate Dolan by discrediting Connaughton before the forthcoming election and thereby fortifying its reputation within its circulation area as the dominant respected and influential image maker to the detriment of the *Enquirer*.

*Connaughton*, *supra*, at 846.

**(K) It Is Difficult To Square The *Bose* Rule With The Seventh Amendment.**

It is established law that libel cases belong to that species of lawsuits which carry the right to trial by jury. *Ross* v. *Bernard*, 396 U.S. 733, 735 (1970). Justice Black believed that second-guessing a jury's findings and credibility assessment is exactly what the Seventh Amendment forbids. *Curtis Publishing Company* v. *Butts*, 388 U.S. 130, 171 (1967).

In formulating the *New York Times* rule, this Court endeavored to circumvent the Seventh Amendment by stating that it does not preclude the Court from determining whether federal law has been properly applied to the facts. *New York Times*, *supra*, at 709-710, n. 26. Somehow, that does not quite dispose of the matter.

The free press guarantee has no greater weight than any other guarantee embodied in the Bill of Rights. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 561 (1976). Thus, the First Amendment should not be construed so as to diminish the force of the Seventh Amendment.

In reality, pretending that the Seventh Amendment is not an obstacle to independent *de novo* review is a good deal like pretending that the elephant sitting in the living room doesn't exist.

## CONCLUSION

A critical survey of this massive record of direct and circumstantial evidence of the *Journal News*' serious doubts as to the truth of Alice Thompson's accusations, resolving all reasonable inferences from the evidence, including assessments of credibility,[11] in favor of Connaughton, *Connaughton* v. *Harte-Hanks*, 842 F.2d 825, 845 (1988), *Tavoulareas*, panel opinion, *supra*, at 109, would impel the conclusion that the Sixth Circuit's judgment of affirmance was inexorably correct. As we have shown, that judgment would actually be reinforced by an evaluation of each underlying issue of fact. Would Harte-Hanks wish a remand to the Court of Appeals only to lose again?

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[11] ". . . findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context.", *Bose*, at 515, Rehnquist, J., dissenting.



However, Petitioner's plea for appellate review of each separate, underlying factual issue must be rejected because, . . . "that kind of *de novo* appellate review . . . would eviscerate the role of the jury and . . . vest appellate courts with original jurisdiction in libel actions." *Tavoulareas*, *supra*, at 108, and it would violate the Seventh Amendment rights. "The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 174 (1967), Brennan, J., concurring.

Beyond that, this paradigm case perfectly illustrates the aptness of Chief Justice Rehnquist's contention that the *Bose* requirement of *de novo* appellate review is practically infeasible. Constitutional theory aside, the task of second-guessing a jury verdict is virtually impossible in a case such as this where liability is subjective rather than objective, where the issue is what Jim Blount, Pam Long, Bob Walker, Joe Cocozzo and James Irwin actually believed when they decided to publish Alice Thompson's charges. "A determination as to the actual subjective state of mind [of those particular people at that particular time]" is thus a far more tenuous exercise for an appellate court than deciding whether material appeals to prurient interests. *Bose*, *supra*, at 518, n. 1.

Seen in this light, the independent appellate review requirement which this Court has specially tailored for public figure libel cases, constitutionally troublesome and practically infeasible in itself, is doubly flawed, coupled as it is with the culpability test this Court has also specially tailored for such cases.

In conclusion, we respectfully submit that for the multitude of reasons stated hereinabove this honorable Court should affirm the Sixth Circuit's judgment. We also express the hope that the Court will either discard the requirement of

independent appellate review or at least clearly limit it to the determination of the ultimate fact.

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